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In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

FEDERAL TRADE COMMISSION, PETITIONER

v.

ADOLPH COORS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the Tenth Circuit that set aside two paragraphs of the Commission's order.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 497 F. 2d 1178. The decision of the Federal Trade Commission (Pet. App. B) is not yet reported.

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[1]The court of appeals opinion is set forth as Appendix A of the petition for a writ of certiorari in *Adolph Coors Company* v. *Federal Trade Commission*, No. 74-128, seeking review of other aspects of the judgment of the court of appeals. The Federal Trade Commission decision is set forth as Appendix B and the Initial Decision of the Administrative Law Judge as Appendix C of that petition. These opinions are not reproduced herein. "Pet. App." refers to the appendix to the petition in No. 74-128.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1974. On August 27, 1974, Mr. Justice White extended the time for the Federal Trade Commission to file a petition for a writ of certiorari to October 9, 1974, and on October 1, 1974, he granted a further extension to and including November 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The court of appeals sustained the determination of the Federal Trade Commission that respondent, a brewer, had violated Section 5 of the Federal Trade Commission Act in several aspects of its relationships with the independent distributors of its beer, including its use of the threat of speedy termination of the distributorship agreements to force the distributors into anticompetitive behavior.

The question presented is whether the court of appeals improperly constricted the Commission's remedial authority by setting aside provisions in the Commission's order requiring the brewer to cease and desist from cancelling any distributorship agreement unless it gives the distributor longer notice than it now is obliged to give and the right to arbitrate disputes concerning termination.

STATUTE INVOLVED

Section 5(a) and (c) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(a) and (c), provides in part:

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * * * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

* * * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business * * *.

STATEMENT

1. *The administrative proceedings.* On June 7, 1971, the Federal Trade Commission (the "Commission") issued a complaint charging that Adolph Coors Company ("Coors"), a brewer, violated Section 5 of the Federal Trade Commission Act. The complaint alleged that Coors imposed price, territorial and customer restrictions upon the distributors and retailers of its beer.

After extensive hearings, the Administrative Law Judge found that Coors had not violated the Act and dismissed the complaint (Pet. App. C). On appeal by complaint counsel, the Commission vacated the initial decision (Pet. App. B). Substituting its findings for those of

the Law Judge (see Pet. App. B-12), the Commission concluded that Coors had violated the Act and issued a thirteen-paragraph cease and desist order. Paragraphs 1 through 11 (Pet. App. B-2—B-5) prohibit Coors from engaging in specific anticompetitive marketing practices.[2] The Commission found (Pet. App. B-49—B-58) that Coors had used the threat of termination under the short-notice provisions of its distributorship agreements (five days if for cause; 30 days if without cause) to coerce the distributors to engage in anticompetitive conduct (Pet. App. B-49—B-55) and that Coors' "use of these provisions under the circumstances of this case * * * constitute[d] an unfair method of competition" (*id.* at B-55). Paragraphs 12 and 13 of the order prohibited Coors from terminating any distributorship agreement unless it gave the distributor longer notice than it previously had been obliged to give (60 days if for cause; 180 days if without cause) and a right to arbitrate disputes concerning termination (*id.* at B-5—B-7).

In including these provisions governing Coors' termination of its agreements with its 166 independently-owned distributors (Pet. App. A-5),[3] the Commission pointed out that, because the distributorships are not assignable and involve investments of up to $2,000,000 (Pet. App. B-50, n. 20), the threat of cancellation was a highly effective means of obtaining the distributors' acquiescence in Coors' wishes.

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[2]The Commission found, *inter alia*, that Coors had engaged in wholesale and retail price fixing (Pet. App. B-15—B-33), territorial restraints (*id.* at B-33—B-39), coercion of retailers to sell its draught beer exclusively (*id.* at B-39—B-45), and refusals to sell to central warehouse accounts (*id.* at B-45—B-49).

[3]One additional distributor is wholly-owned by Coors (Pet. App A-5).

2. *The court of appeals decision* On petition for review by Coors, the court of appeals affirmed in part and reversed in part (Pet. App. A). After concluding that the Commission's findings were supported by substantial evidence (Pet. App. A-10, A-15—A-16), the court unanimously upheld paragraphs 1 through 11 of the cease and desist order, but, Judge Holloway dissenting, set aside paragraphs 12 and 13 (Pet. App. A-19).

The court stated that the termination provisions in the distributorship contracts are "a matter of private contract and are not subject to interference by third parties" (Pet. App. A-18) and indicated that those provisions could be interfered with only if, standing alone, they violated Section 5 of the Act (*ibid.*). Judge Holloway concluded that paragraphs 12 and 13 should be sustained in view of the termination threats utilized by Coors "to force acquiescence of its distributors in anti-competitive behavior," the Commission's wide discretion "in its choice of remedy deemed adequate to cope with unlawful practices," and cases such as *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, which have upheld "orders affecting contractual relationships * * * where unlawful practices involved similar subtle pressures and threats of termination of dealers' leases" (Pet. App. A-20).

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the authority of the Federal Trade Commission to require changes in contract terms when necessary or appropriate to provide effective relief. The holding of the court of appeals that the Commission does not have that authority conflicts with decisions of this Court and other courts of appeals concerning the permissible scope of the Commission's remedial powers. This Court

should review the decision of the court of appeals for the further reason that that court's narrow view of the Commission's powers, if accepted, would substantially limit the Commission's ability to remedy effectively a wide variety of anticompetitive practices.

1. The limited function of a court in reviewing relief ordered by the Commission is to determine whether the Commission exceeded its discretion in selecting an appropriate remedy to eliminate past or future unlawful practices. Since the Commission has wide discretion to devise appropriate remedies, "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613. See also *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-430; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392-395.

The court of appeals did not conclude that the limitations on Coors' power to terminate distributors imposed by paragraphs 12 and 13 are not reasonably related to Coors' unlawful practices, and, on this record, it could not properly have so ruled. Indeed, the court sustained (Pet. App. A-17) the Commission's finding that Coors had used express and implied threats of termination to induce anticompetitive behavior by distributors, on the basis of which the Commission had concluded that the termination provisions "have been part and parcel of the aggregation of trade restraints in which respondent has engaged, and must fall with them" (Pet. App. B-55), and that it would not be suffi-

cient to order Coors to refrain from terminating or threatening to terminate distributors who refuse to engage in anticompetitive activities.[4]

Where, as here, the relief ordered bears a reasonable relationship to the violation found, the relief need not be be limited to conduct or matters that themselves would violate the Act. The Commission, like a court remedying an antitrust violation, is empowered to impose prophylactic measures bearing upon activities that might otherwise be lawful. See, *e.g.*, *United States* v. *Loew's, Inc.*, 371 U.S. 38, 53; *Federal Trade Commission* v. *National Lead Co., supra,* 352 U.S. at 430; *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 724. Accordingly, the court of appeals erred in holding that the Commission could not interfere with Coors' contract termination provisions because they "do not violate Section 5 of the Federal Trade Commission Act" (Pet. App. A-18).

2. The court of appeals further erred in ruling that paragraphs 12 and 13 were invalid because they dealt with "private contract" obligations that "are not subject to interference by third parties" (Pet. App. A-17-A-18).

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[4]The Commission observed that an order merely prohibiting coercive threats "would be extremely difficult to enforce and would therefore do little to encourage the independent choice by distributors in matters of pricing and customer selection that is necessary to remedy the abuses found in the record" (Pet. App. B-56). As the Commission said, "[s]o long as [Coors] * * * can cut off its distributor 'without cause' there is always some possibility that it will exercise the power, and threaten to exercise the power to anticompetitive ends" (*id.* at B-57). Paragraphs 12 and 13 are reasonably designed to curtail this possibility "while at the same time not unduly hampering Coors' capacity to terminate poorly performing distributors" (*ibid.*).

In *Federal Trade Commission* v. *Motion Picture Advertising Serv. Co.*, 344 U.S. 392, this Court, in a proceeding under Section 5, sustained a Commission order requiring modifications of existing contracts,[5] and other courts of appeals have also upheld such relief. See, *e.g.*, *Luria Bros. & Co.* v. *Federal Trade Commission*, 389 F. 2d 847 (C.A. 3), certiorari denied, 393 U.S. 829; *La Peyre* v. *Federal Trade Commission*, 366 F. 2d 117 (C.A. 5).[6] These decisions apply the general principle noted by this Court in *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 18, that governmental interests "frequently override agreements that private parties make" and that agreements that are lawful as a matter of private contract law "must give way before the federal antitrust policy." Antitrust decrees, for example, frequently require substantial modifications of private contracts. See, *e.g.*, *Besser Mfg. Co.* v. *United States*, 343 U.S. 444, 447; *United States* v. *National Lead Co.*, 332 U.S. 319, 357-358; *United States* v. *Bausch & Lomb Optical Co.*, *supra*, 321 U.S. at 723-724; *United States* v. *United Shoe Mach. Corp.*, 110 F. Supp. 295, 352-353 (D. Mass.), affirmed, 347

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[5]In *Motion Picture Advertising*, the Commission prohibited a distributor of advertising motion pictures from entering into exclusive display contracts for more than one year and "from continuing in effect any exclusive provision of an existing contract longer than a year after the date of service in the Commission's order." *Id.* at 394. This Court said that the Commission did not exceed "the limits of its allowable judgment" in adopting that provision. *Id.* at 396. See also *Atlantic Refining Co.* v. *Federal Trade Commission*, *supra*, 381 U.S. at 361-362, nn. 2,3, 372-376.

[6]In *Luria* the Commission prohibited various companies from purchasing more than 50 per cent of their scrap metal from Luria although existing contracts required them to purchase greater amounts. 389 F. 2d at 863. In *LaPeyre* the Commission imposed limits on rentals for machinery at rates less than those specified in some of the existing leases. 366 F. 2d at 121.

U.S. 521. The power to restrain a violator of the Federal Trade Commission Act from exercising rights it may have under contracts with other private parties is essential if the Commission is to deal effectively with the anticompetitive conduct that may have been used to secure those rights or that may result from their exercise. The court of appeals' denial of such power to the Commission will seriously hinder the Commission in implementing its statutory mandate to prevent unfair acts and practices or methods of competition.[7]

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[7]Resolution of conflicts with respect to the Commission's remedial powers and the scope of judicial review of Commission orders is particularly important because the broad venue provision of the Federal Trade Commission Act, 15 U.S.C. 45 (c), which authorizes review in any circuit where the unfair method, act or practice was used or where the party resides or carries on business, would permit many firms against whom the Commission issues orders to seek review in the court below so as to take advantage of the decision in this case narrowly construing the Commission's authority.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[8]

Respectfully submitted.

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NOVEMBER 1974.

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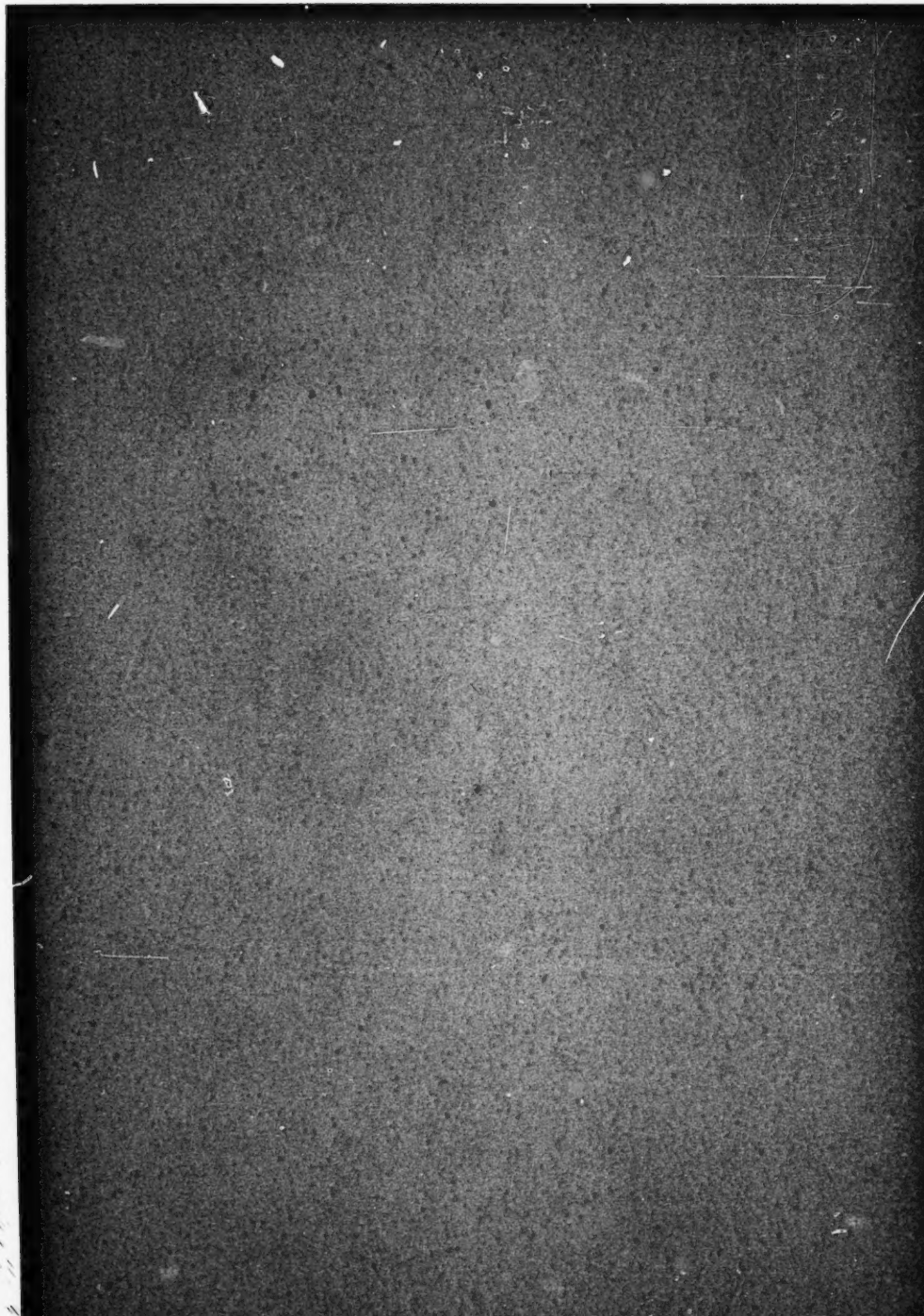
[8]As we have indicated in our response to Coors' petition for a writ of certiorari (No. 74-128) to review the decision of the court of appeals insofar as it sustained the Commission's decision and order, we do not believe that such review is warranted. Because the question presented by this petition is not related to the questions presented by Coors in its petition, there is no need for the Court to grant certiorari in that case if it grants review in this case.

DOJ-1974-11



SUPREME COURT, U. S.
FILE
DEC 17 19
MICHAEL ROBAK, JR.

No. 74-609

In the Supreme Court of the United States

OCTOBER TERM, 1974

FEDERAL TRADE COMMISSION, PETITIONER

v.

ADOLPH COORS COMPANY

BRIEF FOR THE ADOLPH COORS COMPANY IN OPPOSITION

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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No._____

FEDERAL TRADE COMMISSION, PETITIONER

v.

ADOLPH COORS COMPANY

BRIEF FOR THE ADOLPH COORS COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A in No. 74-128) is reported at 497 F.2d 1178. The opinion of the Federal Trade Commission (Pet. App. B in No. 74-128) is not yet reported. The initial decision of the administrative law judge (Pet. App. C in No. 74-128) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1974. On August 27, 1974, Mr. Justice White extended the time for the Federal Trade Commission to file a petition for writ of certiorari to October 9, 1974, and on October 1, 1974, he granted a further extension to and including November 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the court of appeals improperly set aside the unprecedented provisions in the Commissioners' order requiring Coors to provide the right to arbitrate any termination of any distributor which might occur in the future, whether for cause or not, and requiring the arbitrator to determine whether the termination would constitute a violation of the antitrust laws or the FTC Order.

STATUTE INVOLVED

Section 5(a) and (c) of the Federal Trade Commission Act, 15 U.S.C. 45(a) and (c), provides in relevant part:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * * *
>
> (c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business . . . .

STATEMENT OF THE CASE

Through its attorneys ("Complaint Counsel") the Federal Trade Commission filed a Complaint against the Adolph Coors Company, hereinafter referred to as "Coors," on June 7, 1971, alleging that Coors had committed certain unfair practices proscribed by the Federal Trade Commission Act.

The unlawful acts and practices charged in the Complaint were that Coors:

1. Fixed and controlled the prices at which its distributors and retailers sell Coors beer;

2. Unlawfully imposed territorial restrictions on its distributors;

3. Required its distributors to require that their retailers serve Coors draught beer exclusively, or not at all;

4. Unlawfully prohibited its distributors from selling and delivering beer to central warehouse accounts; and

5. Unlawfully included thirty- and five-day cancellation periods in all its distributor contracts, and restrained its distributors from freely selling their distributorships to purchasers of their own choosing and at prices freely determined by the seller and buyer.

Extensive hearings were held before an Administrative Law Judge on February 14, 1972, to March 14, 1972, in Denver, Colorado. At this hearing some 70 witnesses, including three expert witnesses testifying on behalf of Coors, appeared with their testimony consuming nearly 3,000 transcript pages, and the parties introduced some 3,000 documentary exhibits into evidence, totaling over 5,000 pages. The hearing itself lasted a full 30 days. On September 15, 1972, the Administrative Law Judge rendered an initial decision in favor of the Adolph Coors Company on every Complaint allegation and dismissed the Complaint.

Complaint counsel then appealed the initial decision of the Administrative Law Judge to the five-member Federal Trade Commission. After oral argument before the Commissioners, and with four commissioners participating, the Federal Trade Commission completely substituted their own findings of fact and conclusions of law for those of the Administrative Law Judge and rendered their own decision, finding in favor of Complaint Counsel on every issue alleged in the Complaint.

The Commission decision and order issued July 24, 1973, was served upon the Adolph Coors Company on August 6, 1973 and Coors filed its Petition to Set Aside in the United States Court of Appeals for the Tenth Circuit on August 15, 1973.

The United States Court of Appeals for the Tenth Circuit heard oral argument on the Petition of Coors on March 19, 1974, and subsequently issued its opinion which so far as the instant Petition is concerned set aside paragraphs 12 and 13 of the said Federal Trade Commission Order.

The termination and arbitration provisions in Paragraphs 12 and 13 of the Commissioners' Decision and Order here are as follows (See Pet. App. B-5-7 in No. 74-128):

12. Cancelling any distributor agreement unless and until the respondent has pursued the following procedure:

A. Cancellation With Cause

(a) Respondent has given the distributor sixty days' notice of respondent's intention to cancel its agreement with the distributor;

(b) Said notice, referred to in (a) above, will include in writing an assurance that the contract is being terminated in good faith and for material violation of one or more contract provisions which are relevant to the effective operation of the franchise. Said notice shall further provide a list of the specified reasons for which the franchise is being terminated;

(c) Said notice will include the assurance that the distributor may sell his interest to a third party during the sixty days, subject to the respondent's approval of the buyer as a satisfactory distributor of respondent's products and the further assurance that approval will not be unreasonably withheld;

(d) Said notice will also include the statement that the distributor has the right to have the contract

cancellation reviewed in an arbitration proceeding as hereinafter provided, to ascertain whether the termination has been made otherwise than in good faith and otherwise than for material violation of one or more contract provisions which are relevant to the effective operation of the franchise.

B. Cancellation Without Cause

(a) Respondent has given the distributor one hundred and eighty days' notice of respondent's intention to cancel its agreement with the distributor;

(b) Said notice, referred to in (a) above, will include in writing an assurance that the contract is being terminated in good faith. Said notice shall further provide a list of the specific reasons for which the franchise is being terminated.

(c) Said notice will include the assurance that the distributor may sell his interest to a third party during the one hundred and eighty days subject to the respondent's approval of the buyer as a satisfactory distributor of respondent's products, and the further assurance that approval will not be unreasonably withheld;

(d) Said notice will also include the statement that the distributor has the right to have the contract cancellation reviewed in an arbitration proceeding as hereinafter provided to ascertain whether the termination has been made otherwise than in good faith.

13. **IT IS FURTHER ORDERED** that respondent, within three (3) months from the date this Order becomes final, shall provide for arbitration, in the city in which a distributor resides, by an independent and neutral arbitrator, to determine in the case of any announced termination, and upon the request of a distributor, whether or not said termination is made in good faith (in the case of termination without cause) or whether or not said

termination is made in good faith and for material violation of one or more contract provisions which are relevant to the effective operation of the franchise (in the case of termination with cause). The arbitrator shall find that a cancellation of any distributor agreement is not made in good faith if the arbitrator finds that the termination would constitute a *violation of the antitrust laws or this order.* (Emphasis added.)

Said arbitration shall be initiated by respondent within fifteen (15) days from the date of a request by the distributor, which request shall be made not later than fifteen (15) days after notice of proposed cancellation. If respondent fails to provide for arbitration within the time limit, or if the arbitrator finds that cancellation is not proposed in good faith (and for material violation of one or more contract provisions relevant to the effective operation of the franchise in the case of termination for cause), respondent shall reinstate the distributor at the location he held prior to cancellation and shall allow the distributor to reenter into a distributor agreement.

All costs of arbitration, except for the distributor's attorney's fees, shall be borne by respondent, provided, however, that if in the course of arbitration proceeding it is determined by the arbitrator that the distributor's claims are not brought in good faith, the distributor shall bear the costs of arbitration other than the respondent's attorney's fees. The distributor's right to arbitration shall be conspicuously noted in all present and future distributor agreements.

Thus Commission Order paragraphs 12 and 13 require that any termination by Coors of any Coors distributor, whether for "cause" or not, must be submitted to arbitration. These arbitration provisions of the Commission cover claims which have not yet arisen, and the Commissioners' Order requires arbitration at the request of the

distributor only, not by mutual agreement. The arbitrator under the Commissioners' order here must determine whether Coors acted in "good faith" and whether Coors violated "the antitrust laws or this Order" in the termination.

The United States Court of Appeals for the Tenth Circuit held below, adopting the conclusion in this regard of the Administrative Law Judge (See Pet. App. C-181 in No. 74-128), that:

> . . .[t]he termination provisions of Coors and its distributors, based upon their contractural obligations, are a matter of private contract and are not subject to interference by third parties. The termination provisions are reasonable but may not be used by Coors to force any unlawful conduct. Therefore, the Commission's attempt to rewrite Coors' contract termination provisions in paragraphs 12 and 13 of its Order must be set aside. The contract termination provisions do not violate Section 5 of the Federal Trade Commission Act. 497 F. 2d at 1189.

ARGUMENT

1. The Federal Trade Commissioners' Order requiring mandatory arbitration of every termination with six months advance notice of termination, and including arbitration of antitrust issues and whether or not the order of the Federal Trade Commissioners has been violated by the termination, conflicts with a decision of this Court and of decisions of Federal courts of appeal precluding such arbitration.

This court in *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953), held invalid a contractural provision requiring arbitration of claims of violation of the Securities Act of 1933, stating:

> This case requires subjective findings on the purpose and knowledge of an alleged violator of the act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the

> arbitrators' conception of [legal requirements] cannot be examined. Power to vacate an award is limited .... The United States Arbitration Act contains no provision for judicial determination of legal issues .... 346 U.S. 435-436.

The United States Courts of Appeals considering the issue have uniformly held that, as here, blanket arbitration provisions requiring arbitration of disputes which might arise in the future to determine whether the antitrust laws have been violated are illegal. *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2nd Cir. 1968); *Associated Milk Dealers, Inc. v. Milk Drivers Union, Local 753*, 422 F.2d 546 (7th Cir. 1970); *Power Replacements, Inc. v. Air Preheater Co.*, 426 F.2d 980 (9th Cir. 1970); *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974). As the United States Court of Appeals for the 5th Circuit held in the *Cobb* case, *supra.*

> Within the last five years, three of the Circuit Courts of Appeals, the Second, Eighth and Ninth Circuits, have addressed questions of the appropriateness of arbitration of issues arising under the federal antitrust laws. All three have decided that claims under the antitrust laws are 'of a character inappropriate for enforcement by arbitration', *American Safety Equipment Corp. v. J. P. Maguire and Co., supra,* 391 F.2d at 825, quoting *Wilko v. Swan*, 2 Cir. 1953, 201 F.2d 439, 444, reversed, 346 U.S. 427, 74 S. Ct. 182, 98 L.Ed. 168. Accordingly, they have fashioned what the District Court in this case characterized as a 'general rule to the effect that antitrust claims are not subject to arbitration'.
>
> * * * *
>
> The *American Safety Equipment Corp.* case outlined three major considerations supporting this rule. The first was a broad range of public interest effected by private antitrust claims. The Court recognized that '[a] claim under the antitrust laws is not merely a private matter', because private antitrust actions are an integral part of the effort of the antitrust laws 'to promote the national interests in a competitive economy'. 392 F.2d at 826. The Second Circuit noted that it is doubtful Congress

> could have 'intended such claims to be resolved elsewhere than in the courts'. Id. at 827. The second is the complexity of the issue and the extensiveness and diversity of the evidence antitrust cases usually involve. These render antitrust claims 'far better suited to judicial than to arbitration procedures'. Id. The third is the questionable propriety of intrusting the decision of antitrust issues to commercial arbitrators, who 'are frequently men drawn for their business expertise', when 'it is the business community generally that is regulated by the antitrust laws'. Id. at 827.
>
> We are persuaded by these considerations. We agree that 'the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the outcome ... clear', *American Safety Equipment Corp.*, 391 F.2d at 828. Accordingly, we join the Second, Eighth, and Ninth Circuits in holding here that, as a general matter, the antitrust claims are not appropriate subjects of arbitration. 488 F.2d at 41.

2. An order of the Federal Trade Commissioners must not only be supported by substantial evidence in the record as a whole, which as this respondent has pointed out in its Petition for writ of certiorari in No. 74-128 is certainly not the case in this matter, but must also be reasonable and necessary based upon the actual findings of violation by the Commissioners. *F.T.C. v. National Lead Co.*, 352 U.S. 419, 77 S. Ct. 502, 1 L.Ed 2d 438 (1957); *Papercraft Corp. v. F.T.C.*, 472 F.2d 927 (7th Cir. 1973).

In *Papercraft Corp. v. F.T.C., supra*, cited to the court of appeals below by the Adolph Coors Company, the court held that a remedy imposed by the Commissioners must be deleted from the order because:

> [W]hen [the Commissioners select] an untried and blunt instrument which will certainly cause some impairment of statutory objectives, we require a more careful exposition of its justification before we will sanction it as a proper remedial tool. The Commission failed to make an

> adequate demonstration [in its findings and decision] of the need for its exceptional remedy. (472 F.2d at 932)

The Federal Trade Commissioners in the Coors case failed to make any findings of justification for the arbitration provisions they drafted, and failed to cite a single authority for same in their order.

The arbitration and termination provisions of paragraphs 12 and 13 of the Commissioners' order are inextricably tied together. The court below could not sanction the redraft of the termination provisions without granting the illegal arbitration provisions. Moreover, the order provisions were not responsive to nor justified by the evidence in the record considered as a whole; were clearly not necessary; were arbitrary and capricious; were in violation of the petitioner's right to liberty and property; and constituted an unprecedented attempt here by the Commissioners to intrude upon the private contract rights of the parties to the distribution agreements.

CONCLUSION

The decision of the United States Court of Appeals below setting aside paragraphs 12 and 13 of the Federal Trade Commission's order is correct. There is no conflict of decisions concerning the authority for such action and, indeed, the decisions on the point clearly support that action of the Court of Appeals below. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-609

FEDERAL TRADE COMMISSION, PETITIONER

v.

ADOLPH COORS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

Respondent Coors has not even attempted to respond to our petition insofar as it challenges the court of appeals' setting aside of Paragraph 12 of the Federal Trade Commission's order, which imposes notice limitations on Coors' right to cancel its distributorship agreements.[1] Nor does Coors dispute that the questions presented by the petition may appropriately be considered independently of Coors' own petition for a writ of certiorari. Coors' response is essentially limited to an argument on the merits as to the portion of the petition

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[1]Coors asserts that the notice requirement of Paragraph 12 is "inextricably tied" to the arbitration provisions of Paragraph 13 (Br. in Opp. 10), but the substance of Paragraph 12, which in fact makes only a passing reference to Paragraph 13, would stand unimpaired even if Paragraph 13 were set aside.

challenging the court of appeals' setting aside of Paragraph 13 of the order, which requires Coors to afford terminated distributors a right to submit specified issues concerning the termination to arbitration.

Coors asserts that Paragraph 13 is invalid—for reasons not relied upon by the court of appeals—because "blanket arbitration provisions requiring arbitration of disputes which might arise in the future to determine whether the antitrust laws have been violated are illegal" (Br. in Opp. 8). The cases on which Coors relies, however, did not involve judicial or administrative orders; they involved contractual arrangements purportedly preventing a potential victim of an antitrust violation from seeking redress in a federal court.[2]

Moreover, the federal courts have rejected claims that antitrust issues can never be submitted to an arbitrator. See, *e.g.*, *Coenen* v. *R. W. Pressprich & Co.*, 453 F. 2d 1209, 1215 (C.A. 2), certiorari denied, 406 U.S. 949 (antitrust claims may be submitted to arbitrator if parties agree to arbitrate after dispute arises). See also *Cobb* v. *Lewis*, 488 F. 2d 41, 47-48 (C.A. 5).

This Court has also recognized that disputes having antitrust implications can be a proper subject for arbitration. In *United States* v. *Paramount Pictures, Inc.*,

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[2]See *Power Replacements, Inc.* v. *Air Preheater Co.*, 426 F. 2d 980, 983 (C.A. 9), quoting from *American Safety Equipment Corp.* v. *J.P. Maguire & Co.*, 391 F. 2d 821, 826 (C.A. 2):

> "A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest."

See also *A. & E. Plastik Pak Co.*, v. *Monsanto Co.*, 396 F. 2d 710, 716 (C.A. 9).

334 U.S. 131, 176, the Court held that a district court has discretion to include a consensual arbitration provision in an antitrust decree as "an auxiliary enforcement procedure," if it does not bar "the use of other remedies the law affords for violations either of the Sherman Act or of the decree of the court." The Commission's arbitration provision does not deny a distributor access to the federal courts; rather, it provides an additional remedy.

In any event, the arbitration provision is not limited to claims that raise antitrust issues. Although the Commission's order provides that cancellation is not made in good faith for the purposes of the order if "the termination would constitute a violation of the antitrust laws or this Order" (Pet. No. 74-128, App. B-6), an arbitrator may also determine whether a termination for "cause" is in fact based upon a "material violation of one or more contract provisions which are relevant to the effective operation of the franchise" (*ibid.*). Submission of such questions to arbitration would not interfere with the jurisdiction of the federal courts over antitrust claims.

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General.

CALVIN J. COLLIER,
General Counsel,
Federal Trade Commission.

JANUARY 1975.